

( **FEDERAL MARITIME COMMISSION** )  
( **SERVED MAY 28, 1996** )  
( **EXCEPTIONS DUE 6-19-96** )  
( **REPLIES TO EXCEPTIONS DUE 7-11-96** )

**FEDERAL MARITIME COMMISSION**

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**DOCKET NO. 96-03**

**F&D LOADLINE CORPORATION  
POSSIBLE VIOLATIONS OF SECTION 10(b)(1)  
OF THE SHIPPING ACT OF 1984**

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Respondent NVOCC found to have violated section 10(b)(1) of the 1984 Shipping Act (46 U.S.C. app. sec. 1709(b)(1)) by charging rates other than those specified in its tariff on 32 occasions between June 1994 and March 1995. Respondent's tariff has been cancelled and it has ceased operations. Its only known assets are its \$50,000 bond. Accordingly, a penalty in that amount is assessed.

*Vern W. Hill* and *Carolyn Grigg* for the Bureau of Enforcement.  
No appearance for respondent.

**INITIAL DECISION<sup>1</sup> OF NORMAN D. KLINE,  
ADMINISTRATIVE LAW JUDGE**

The Commission instituted this proceeding by order served February 7, 1996, naming as respondent a non-vessel operating common carrier (NVOCC) known as F&D Loadline

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<sup>1</sup>This decision will become the decision of the Commission in the absence of review thereof by the Commission (Rule 227, Rules of Practice and Procedure, 46 CFR 502.227).

Corporation (F&D). (See Order of Investigation, served that date.) As stated in the Order, F&D had its principal place of business in Taipei, Taiwan and, for a time during 1994 and 1995, had filed a tariff with the Commission with a surety bond. Furthermore, as required by law, F&D had named as its resident agent for service of process the Washington International Insurance Company located in Schaumburg, Illinois. See section 23(c) of the Shipping Act of 1984, 46 U.S.C. app. sec. 1721(c); and 46 CFR 583.5(a).

According to information developed by BOE, F&D appeared to have transported at least 32 shipments from Taiwan to the United States between June 30, 1994 and March 1, 1995 at rates other than those set forth in its tariff. If so, such conduct would constitute violations of section 10(b)(1) of the Act (46 U.S.C. app. sec. 1709(b)(1)). For such violations the Commission is authorized to assess penalties and to suspend tariffs and to issue other appropriate orders pursuant to sections 13 and 14 of the Act (46 U.S.C. app. secs. 1712 and 1713). The Commission therefore initiated this proceeding to determine specifically four issues, namely, as follows:

1. Whether F&D violated section 10(b)(1) of the 1984 Act by transporting shipments at rates lower than those filed in its tariff;
2. Whether, in the event F&D is found to have violated section 10(b)(1) of the 1984 Act, civil penalties should be assessed against F&D and, if so, the amount of such penalties;
3. Whether, in the event F&D is found to have violated section 10(b)(1) of the 1984 Act, a cease and desist order should be issued; and

4. Whether, in the event F&D is found to have violated section 10(b)(1) of the 1984 Act, its tariff should be suspended pursuant to section 13 of the 1984 Act.

After the Commission's Order was served, BOE commenced limited discovery and a procedure for the development of the evidentiary record was established. Although service of the Commission's Order and of my rulings was made on the agent designated by F&D, under the law mentioned above, and although F&D was specifically advised that its failure to participate in the proceeding or to respond to BOE's case-in-chief could lead to an adverse judgment against BOE similar to a default judgment, F&D has failed to respond either to BOE's case-in-chief or to BOE's initial brief. (See Schedule Established for Filing Evidence and Briefs, March 18, 1996; and Motion to Admit Evidence Granted, April 24, 1996.) In the second ruling cited, F&D was again warned that its failure to respond to BOE's case-in-chief or to BOE's initial brief would be construed to mean that F&D, in effect, had defaulted and that a decision would be issued based on BOE's evidence and arguments in its brief. There has been no reply by F&D. Accordingly, the evidentiary record consists of affidavits of Commission investigators, staff personnel, and BOE's counsel, plus supporting documents.<sup>2</sup>

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<sup>2</sup>The evidence submitted by BOE and admitted is as follows:

Exhibit No. 1 - Affidavit of Commission Investigator Michael A. Moneck.

Exhibit No. 2 - Affidavit of Mr. Ernest L. Estes, a Transportation Specialist in the Commission's Office of Tariffs, Bureau of Tariffs, Certification, and Licensing, with attachments, consisting of copies of 32 F&D bills of lading and supporting documents and worksheets relevant to affiant's examination of the bills of lading.

Exhibit No. 3 - Affidavit of Mr. Norman W. Littlejohn, Deputy Director of the Commission's Bureau of Enforcement, with attachments A and B, consisting of a list of 32 bills of lading and ocean freight charged and other documents, consisting of correspondence, a copy of F&D's title

(continued...)

The following findings of fact are taken from the proposed findings of fact contained in BOE's opening brief. In each instance BOE counsel has supported the proposed finding with references to the record. I find that these findings are all properly supported by reliable and probative evidence under the Commission's applicable rule and under the Administrative Procedure Act, 5 U.S.C. sec. 556(d). See 46 CFR 502.154 and 5 U.S.C. sec. 556(d); see also *Unapproved Sect. 15 Agreements--S.African Trade*, 7 F.M.C. 159, 169, 182 (1962).

### FINDINGS OF FACT

1. F&D was an NVOCC which had a tariff on file at the Commission beginning June 12, 1994. The tariff was canceled March 20, 1996, for failure to maintain an NVOCC bond. During the time F&D's tariff was in effect, F&D's place of business was located at 2f, 145, Fu Sheng N. Road, Taipei, Taiwan.

2. F&D had at least two receiving agents in the United States. They are Gloria Express International ("Gloria Express"), 30510 Huntwood Avenue, Hayward, CA 94544, and Perfect Express Corporation ("Perfect Express"), 900 Sivert Drive, Wood Dale, Illinois.

3. The Commission's New Orleans office instituted an investigation of F&D based on allegations that F&D violated the 1984 Act. The Commission investigator who

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<sup>2</sup>(...continued)

page of its tariff, and a copy of its bond, all of which were sent to Mr. Littlejohn from the Commission's former office in New Orleans, Louisiana.

Exhibit No. 4 - Affidavit of Ms. Carolyn Grigg, BOE's trial attorney to this case, with attachments consisting of correspondence relating to service of various documents on F&D or its agents.

conducted the investigation was Jules Johnson ("Johnson"). Johnson ended his employment with the Commission on September 30, 1995.

4. On April 5, 1995, Johnson met with Tom Kingsley and Patrick Chen of Perfect Express, at Perfect Express's office in Wood Dale, IL. At the meeting Johnson was given copies of 20 bills of lading, invoices, canceled checks, and other shipping records pertaining to those shipments. Johnson also was given copies of fax messages between Perfect Express and F&D. The faxes request F&D to send documents requested by Johnson. F&D sent Perfect Express a copy of F&D's NVOCC bond, and a copy of F&D's tariff front page. The bond and tariff page were given to Johnson.

5. District Investigator Michael A. Moneck ("Moneck"), when assigned to the Commission's San Francisco office, served a subpoena on Gloria Express in connection with another Commission proceeding, Docket No. 94-11.

6. In response to that subpoena, Gloria Express turned over to Moneck 12 F&D bills of lading, copies of arrival notices, and other documentation pertaining to the 12 F&D shipments.

7. Moneck copies the bills of lading and other shipping documents pertaining to the 12 F&D shipments and sent the copies to the Commission's New Orleans office.

8. The Acting Director of the New Orleans District Office, Lorraine Jimenez, approved the report submitted by Johnson concerning F&D and forwarded the report to the Deputy Director of BOE, Norman W. Littlejohn, in Washington, D.C. The report included copies of 32 F&D bills of lading, arrival notices, canceled checks and other shipping

documents pertaining thereto, copies of faxes transmitted between F&D and Perfect Express, and a copy of F&D's NVOCC bond and the front page of F&D's tariff.

9. The documents obtained from Gloria Express and Perfect Express pertaining to the 32 shipments transported by F&D were analyzed by a Commission transportation specialist, Ernest A. Estes ("Estes"). Mr. Estes concluded that each of the 32 shipments had been transported by F&D at a freight rate which was lower than the applicable rate published in F&D's tariff. The 32 shipments are identified in the following chart:

No.	B/L Number	Date	Basic Freight Amount Charged	Applicable Basic Freight Charge per tariff	Amount of Undercharge
1	SFO100901G EI	9/15/94	\$ 1,425.00	\$14,160.00	\$12,735.00
2	KAOSFO060 19	6/30/94	1,900.00	28,190.00	26,290.00
3	OAK074101 GEI	7/14/94	2,087.50	32,500.00	30,412.50
4	SFO082701G EI	8/12/94	1,850.00	28,315.00	26,465.00
5	SFO087301G EI	8/17/94	1,450.00	14,160.00	12,710.00
6	SFO089902G EI	8/25/94	1,425.00	14,160.00	12,735.00
7	OAK090001 GEI	8/26/94	5,950.00	70,790.00	64,840.00
8	SFO093101G EI	9/1/94	1,425.00	14,160.00	12,735.00
9	SEA097401G EI	9/3/94	2,867.80	32,500.00	29,632.20
10	SEA095501G EI	9/8/94	134.82	1,605.00	1,470.18

No.	B/L Number	Date	Basic Freight Amount Charged	Applicable Basic Freight Charge per tariff	Amount of Undercharge
11	OAK109601 GEI	10/9/94	1,425.00	14,160.00	12,735.00
12	OAK114901 GEI	10/11/ 94	108.00	900.00	792.00
13	86203	8/11/94	94.99	805.00	710.01
14	86202	8/11/94	61.00	500.00	439.00
15	85301	8/17/94	458.43	3,885.00	3,426.57
16	88001	8/24/94	59.00	500.00	441.00
17	101911	9/21/94	301.60	2,600.00	2,298.40
18	101906	9/21/94	963.48	7,770.00	6,806.52
19	101912	9/21/94	104.98	905.00	800.02
20	101909	9/21/94	122.14	985.00	862.86
21	121604	10/27/ 94	61.61	505.00	443.39
22	121601	10/27/ 94	76.70	650.00	573.30
23	121606	10/27/ 94	218.38	1,790.00	1,571.62
24	121607	10/27/ 94	224.76	4,865.00	4,640.24
25	121608	10/27/ 94	200.08	1,640.00	1,439.92
26	121603	10/27/ 94	89.06	730.00	640.94
27	128802	11/16/ 94	457.25	3,875.00	3,417.75
28	128808	11/16/ 94	208.62	1,159.00	950.38

No.	B/L Number	Date	Basic Freight Amount Charged	Applicable Basic Freight Charge per tariff	Amount of Undercharge
29	170905	2/9/95	40.06	867.00	826.94
30	170906	2/9/95	39.80	920.00	880.20
31	182804	2/22/95	23.10	565.00	541.90
32	183905	3/1/95	239.62	5,186.50	4,946.88

The amount of undercharges in connection with these 32 bills of lading totals \$280,209.72.

10. F&D's resident agent in the United States for service of process was listed in F&D's tariff, on file at the Commission, at Rule 24. The resident agent, Washington International Insurance Company ("Washington International"), 1930 Thoreau Drive, Suite 101, Schaumburg, IL, is the bonding company which issued F&D's \$50,000 NVOCC bond No. 8941199, effective March 18, 1994.

11. On August 30, 1995, a Notice and Demand Letter ("NDL") was sent from BOE to F&D in care of F&D's resident agent, Washington International. The NDL was forwarded by Washington International to F&D.

February 27, 1996, Washington International forwarded to F&D a copy of the Notice of Assignment in this proceeding served by the Commission on February 9, 1996.

## DISCUSSION AND CONCLUSIONS

Section 10(b)(1) of the 1984 Act (46 U.S.C. app. sec. 1709(b)(1)) states that:



No common carrier, either alone or in conjunction with any other person, directly or indirectly, may--

(1) charge, demand, collect, or receive greater, less, or different compensation for the transportation of property or for any service in connection therewith than the rates and charges that are shown in its tariffs or service contracts . . . .

An NVOCC is a carrier that is subject to section 10(b)(1) of the Act. *Trans Ocean-Pacific Forwarding, Inc. (TOP)*, 27 SRR 409, 412 (I.D., F.M.C. notice of finality, February 9, 1996).

Section 10(b)(1) embodies a doctrine long followed in transportation law, namely, strict adherence to tariffs filed with the regulatory agency. In 1915, the Supreme Court described the strict doctrine as follows:

[T]he rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. . . . This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination. *Louisville & Nashville Railroad Company v. Maxwell*, 237 U.S. 94, 97 (1915).

The Commission has followed this "filed-rate" doctrine consistently in the interest of preventing discrimination and has recognized that this law imposes absolute liability upon carriers, i.e., that their motivations and good intentions do not excuse their deviating from their filed tariffs. Although good intentions or other excuses in mitigation may be relevant to the question of penalties to be assessed carriers for deviating from their tariffs, such are not relevant to the question whether the carrier violated its tariff. See discussion and cases cited in *TOP*, cited above, 27 SRR at 412-413; see also *American President Lines Ltd. v.*

*Cyprus Mines Corp*, 26 SRR 1227, 1232-33 (1994); *Marcella Shipping Co. Ltd.*, 23 SRR 857, 862-63 (I.D., F.M.C. notice of finality, March 26, 1986). As these cases show, strict enforcement of tariff law is believed to be essential to the effective outlawing of discriminations. See especially *Cari-Cargo Int., Inc.*, 23 SRR 1007, 1016 (I.D., F.M.C. notice of finality, June 5, 1986), in which the Commission stated:

The requirement of the act that all rates should be published is perhaps the chief feature of the scheme provided for the effective outlawing of all discriminations. If this portion of the act is not strictly enforced, the entire basis of effective regulation will be lost. Secret rates will inevitably become discriminating rates.

There is no question but that the record developed by BOE and the Commission's investigators shows that F&D deviated from its tariff on 32 occasions on shipments it handled moving from Taiwan to the United States between June 30, 1994 and March 1, 1995. (See the table following para. 9 of the findings of fact above.) The total amount of the undercharges for these shipments equalled \$280,209.72. (*Id.*) Whether F&D's shipping customers were happy with their secret discounts is not relevant to the question of violations nor to the question of what penalties should be assessed. Nor is the particular amount of penalty to be assessed determined by the fact that F&D secretly discounted from its tariff in the above total amount. This is a Commission-instituted investigation, not a private complaint case seeking money damages. The measure of the public wrong on account of violation of a statute is not the same as that for private damages. See, e.g., *Penna. R.R. Co. v. International Coal Co.*, 230 U.S. 184, 206 (1913). Therefore, the answer to the first issue posed by the Commission, namely, did respondent F&D violate section 10(b)(1) of the

1984 Act by transporting shipments at rates lower than those filed in its tariff is clearly affirmative.

The answers to issues Nos. 3 and 4 posed by the Commission are also rather straightforward. Issue No. 3 concerned the question whether a cease and desist order should be issued against F&D if F&D were found to have violated section 10(b)(1) of the 1984 Act. However, BOE counsel contends that such an order is not required because F&D has ceased all operations. I note also that F&D appears to have disappeared and that service on the home office in Taiwan has failed because of an apparent change of address or other circumstance. Under all these circumstances and with no reasonable likelihood that F&D will attempt to resume unlawful operations, I agree that issuance of a cease and desist order would not be appropriate. See the discussion in *Marcella Shipping Co., Ltd.*, cited above, 23 SRR at 871-872 (cease and desist order is justified if there is a likelihood that the offenses will continue absent the order; agencies are supposed to fashion sanctions that fit the nature of the offense).

Issue No. 4 concerned the question whether the Commission should suspend F&D's tariff if F&D were found to have violated section 10(b)(1). Again, BOE counsel does not recommend such action because F&D's tariff has already been canceled, effective March 20, 1996, because of F&D's failure to maintain a bond. I agree therefore that no suspension order is necessary.

The remaining issue is No. 2, the question whether penalties should be assessed against F&D and if so, in what amount. The problem is not so much the question of whether any penalties should be assessed under the myriad factors that I must weigh and

consider under applicable law. The difficulty is rather in determining the precise amount. This particular question poses the greatest challenge to a judge. Whereas the questions concerning whether a respondent did in fact violate its tariff and tariff law depend on evaluating the evidence to determine if it preponderates against a respondent, the question of fixing a precise amount of penalty is ordinarily much more difficult because the presiding judge must weigh and consider a number of factors, attempt to quantify them, and produce a single precise numerical result. See the discussion of how this process works in *Marcella Shipping Co. Ltd.*, cited above, 23 SRR at 865-871; *Cari-Cargo Int., Inc.*, cited above, 23 SRR at 1017-1021. In the instant case, however, the job is much easier because of the fact that F&D's ability to pay is limited to the amount of its bond, there being no evidence of any other assets held by F&D.

Section 13(a) of the 1984 Act (46 U.S.C. app. sec. 1712(a)), which authorizes the Commission to assess civil penalties, provides as follows:

(c) ASSESSMENT PROCEDURES.--[T]he Commission may, after notice and an opportunity for hearing, assess each civil penalty provided for in this Act. In determining the amount of the penalty, the Commission shall take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and such other matters as justice may require.

If it is determined that a penalty should be assessed, the Commission is authorized to fix such penalty at amounts up to \$5,000 for each violation. Section 13(a) of the 1984 Act (46 U.S.C. app. sec. 1712(a)) states:

(a) Assessment of Penalty.--Whoever violates a provision of this Act . . . is liable to the United States for a civil penalty. The amount of the civil

penalty, unless otherwise provided in this Act, may not exceed \$5,000 for each violation. . . .

In particular cases when the record shows that the wrongdoer committed the violations "willfully and knowingly," the Commission may increase the penalty to an amount not exceeding \$25,000 per violation. See section 13(a).

Recognizing that the court in *Merritt v. United States*, 960 F.2d 15, 17 (2d Cir. 1992) has held that the Commission must adduce evidence and take into account each of the factors set forth in section 13(a), as quoted above, BOE counsel has considered the record in this regard. Counsel argues that the record shows 32 instances in which F&D did not charge the rates set forth in its tariff and undercharged the shippers an aggregate of over \$280,000. Counsel argues that it is obvious that F&D "routinely ignored" the requirement that F&D adhere to its tariff rates. BOE counsel also notes that F&D (rather than its agents) was not fully forthcoming, limiting itself to the furnishing of its bond and a tariff front page, which documents are already on file with the Commission. Counsel notes furthermore a lack of mitigating circumstances and the fact that F&D's resident agent transmitted documents to F&D regarding the instant investigation of its activities. Counsel state furthermore that F&D's tariff was in effect for just under two years and that the Commission's records show no previous violations by F&D. Counsel concludes by arguing that F&D appears to have no assets in the United States other than its bond, which, according to section 23 of the 1984 Act, remains liable for any penalty, but is limited to \$50,000 in amount. Accordingly, BOE counsel argues that "[t]he Administrative Law Judge should impose a penalty commensurate with these facts." I agree.

Because the record shows 32 separate violations of section 10(b)(1) of the 1984 Act, the Commission could literally assess a penalty up to \$160,000 (32 times \$5,000). If this record had shown with evidence that F&D committed the violations "willfully and knowingly" within the meaning of section 13(a) and comparable regulatory statutes, the Commission could consider raising the maximum up to \$800,000. The Commission is required to weigh the various factors enumerated in the statute before fixing the amount of a penalty and to make specific findings regarding them. However, the court also held that "the Commission may in its discretion determine how much weight to place on each factor. . . ." *Merritt v. United States*, cited above, 960 F.2d at 17. Furthermore, the Commission, like any regulatory agency, is also required to base whatever sanctions it imposes on the facts as well as the law. *Id.* See also *Marcella Shipping Co., Ltd.*, cited above, 23 SRR at 871-872 (agency has responsibility to tailor the remedy to the particular facts of each case).

In the instant case, F&D has furnished little in response to BOE's requests, although its agents in the United States have been forthcoming. Whether F&D's conduct of disregarding its tariff over nearly two years in 32 instances should be found to be "knowing and willful" and thus justify raising the maximum penalty from \$160,000 to \$800,000 is an interesting but academic question, unlike previous cases in which there was specific evidence on which to base the finding. See, e.g., *TOP*, cited above, 27 SRR at 412; *Marcella Shipping Co., Ltd.*, cited above, 23 SRR at 868-869. However, even if there were such specific evidence, the one critical factor in this case is that concerning F&D's ability to pay. As BOE's counsel argues, the only asset available to pay a penalty is F&D's bond, which is limited to \$50,000. Also, F&D's tariff has been canceled and F&D has apparently ceased